United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-7245

United States Court of Appeals

For the Second Circuit

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P/S

J. P. FOLEY & CO., INC., JOHN P. FOLEY, ANNE A. FOLEY and ANITA SALISBURY,
Plaintiffs-Appellees,

against

OLIVER D. VANDERBILT, JAMES B. RAMSEY, JR., THOMAS MCNELL, BRUCE RAYMOND, RICHARD MCDERMOTT, WILLIAM GROSSCRUGER, FRANK LYNCH, GEORGE MORPURGO, MELVILLE H. IRELAND, JAMES J. RUSH and BLAIR & CO., INC.,
Defendants,

ARTHUR YOUNG & COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF APPELLANT

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3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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J. P. Foley & Co., Inc., John P. Foley, Anne A. Foley and Anita Salisbury,
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REPLY BRIEF OF APPELLANT

This Court should not read into the Code of Professional Responsibility the exceptions advanced by plaintiffs.

The provisions of Canon 5 of the Code of Professional Responsibility relevant here are straightforward. The Code provides that:

> "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is

> obvious that he or a lawyer in his firm ought to be called as a witness * * *" DR 5-101(B)

Again, the Code requires:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial * * *" DR 5-102(A)

The Canon enumerates four specific exceptions to DR 5-101(B) and 5-102(A). Milberg & Weiss would add three more. Thus, they argue that Canon 5 is inapplicable (1) because Feldman will not appear as an advocate at trial and "certainly will not be seated at counsel's table" (M & W Br. p. 7); (2) because Feldman will not testify on plaintiffs' case-in-chief but only on rebuttal; and (3) because Feldman is not a partner, associate or employee of the firm, but "of counsel." Citing DR 5-101(B)(4), Milberg & Weiss also contend that disqualification would "work a substantial hardship" because of their "distinctive value."

A. Disqualification Is Required Even Where the Testifying Lawyer Refrains from Sitting at Counsel Table and Leaves the Conduct of Trial to Others in the Firm.

There is no support in either the Disciplinary Rules or the Ethical Considerations for Milberg & Weiss' proposed exception that Canon 5 is inapplicable because the trial of this action will be conducted by lawyers in the firm

of Milberg & Weiss other than Leonard Feldman. DR 5-101(B) and 5-102(A) are directly to the contrary, providing that a lawyer shall not accept employment or continue as counsel if he knows or learns or it is obvious that "he or a lawyer in his firm" ought to be called as a witness.*

Milberg & Weiss' additional argument that the jury need not even know of Feldman's relationship to the firm if he refrains from participating in the trial as an advocate, and that this would obviate "the prejudice-to-adversaries with which the Rules are concerned" (M & W Br. pp. 8-9), is an attempt to gain advantage for plaintiffs while continuing the prejudice to defendants. The jury is entitled to know of Feldman's long-standing relationship to a firm which by its own claim has "resident expertise in the accounting field" (JA 89), whether or not Feldman consulted with his colleagues with respect to the Foley transaction.** The jury is also entitled to know of Feldman's association with Milberg & Weiss in considering whether or not his testimony is biased as a result of the Milberg & Weiss relationship to plaintiffs. (JA 84) Thus, Milberg & Weiss' argument (Br. pp. 9-10) that Feldman's association with them cannot be disclosed unless he has a direct interest in their contingency fee is flatly wrong. Bias on the part of

* *Renault, Inc.* v. *Auto Imports, Ltd.*, 19 A.D.2d 814, 243 N.Y.S. 2d 480 (1st Dept. 1963), cited by Milberg & Weiss at pp. 11-12 of their brief for the proposition that there is no hard and fast rule that it is "always" improper for an attorney to appear as trial counsel where his partner is a material witness, was decided prior to adoption of the Code. The language of the Code has made that principle as "hard and fast" as careful drafting permits, except for the four specific exceptions set forth therein.

** Since Feldman was counsel at most of the depositions (JA 13-14, 97), the jury can hardly fail to be apprised of his connection with Milberg & Weiss.

a witness does not have to stem from a pecuniary interest, direct or indirect. See *Aetna Ins. Co.* v. *Paddock*, 301 F.2d 807 (5th Cir. 1962);* 3A J. Wigmore, *Evidence* §949 (Chadbourn rev. 1970). Certainly Arthur Young cannot be forced to forego highly relevant impeachment evidence in an attempt to cure the prejudice caused by Milberg & Weiss' continuance in this case.

B. Disqualification Is Required Even Though the Lawyer's Testimony May Be Held Until Rebuttal.

Milberg & Weiss' second proposed exception to the Code is that a firm may act as counsel if the testimony of a lawyer in the firm is introduced only on rebuttal, and not during the client's case-in-chief. With regard to their plans to call Feldman in this case, they state: "Mr. Feldman *may* only be called in rebuttal to possible attributions of knowledge by the defendants to him". (Br. p. 5; emphasis in original). Under the facts of this case, this amounts to a concession that Feldman will be called in rebuttal. No defendant is "possibly" attributing knowledge to Feldman. Feldman had the knowledge—it does not need to be attributed. John Richardson, a non-party witness and the man who negotiated the terms of the Foley transaction with Feldman, has testified that he informed Feldman of most of the facts plaintiffs claim they were never told. (Arthur Young Br., pp. 9-11). Even putting aside the question whether Feldman "ought to" be called

* The Court said: "Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances which, when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only." 301 F.2d at 812.

—which is the inquiry directed by the Code—the facts of this case make it certain that Feldman will be called by the plaintiffs at one time or another.

In *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974), this Court emphasized that "the Code of Professional Responsibility is not designed for Holmes' proverbial 'bad man' who wants to know just how many corners he may cut, how close to the line he may play, without running into trouble with the law." "Rather," the Court continued:

> "it is drawn for the 'good man,' as a beacon to assist him in navigating an ethical course through the sometimes murky waters of professional conduct. Accordingly * * * we must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession." 501 F.2d at 649.

The ethical precept incorporated in DR 5-101(B) and 5-102(A) was written in exactly that spirit. It does not either in words or substance imply that a firm may retain its position as trial counsel depending upon the order in which it calls witnesses. The purpose of Canon 5 is to require a lawyer to refuse employment where his personal interests "may impair his independent professional judgment," DR 5-101, and its principles cannot vary on the basis of counsel's trial tactics.

C. No Exception to the Principles of the Code ~~ld~~ Be Made Because the Attorney ~~ ~~ of Counsel to the Firm.

Milberg & Weiss argue here, as they did below, that even if they would otherwise be disqualified under the Code, Feldman's "of counsel" status makes the Code inapplicable. As with the other proposed exceptions, the short answer is the language of the Code. DR 5-101(B) and 5-102(A) speak of disqualification where a lawyer or "a lawyer in his firm" may testify. The Code expressly avoids the use of such common terms as "partner" or "associate", thus insuring that the prohibition includes all lawyers connected or identified with the firm.

The close connection of Leonard Feldman with the Milberg & Weiss firm, especially during the course of this litigation, is in the record. Milberg & Weiss claim that "The clients of Milberg & Weiss and Mr. Feldman are separate and distinct"; that "Milberg & Weiss do not intend to represent or hold themselves out as representing Mr. Feldman's clients and *vice versa*"; and that "Mr. Feldman participated in but a few fees earned by Milberg & Weiss (not in the instant case) where he and Milberg & Weiss *formally* worked together." (Br. p. 15) But, in the instant case, Feldman has appeared in court, has participated in most of the depositions, and has been held out as the representative of plaintiffs time and again—always on the part of Milberg & Weiss. Moreover, with respect to Milberg & Weiss' assertion that Feldman has no contingency arrangement with plaintiffs dependent upon the outcome of this litigation (M & W Br. pp. 9-10), we leave to the Court to consider whether an attorney has a contingency arrange-

ment where he expects to get paid but (1) does not submit a bill before the matter "explodes", (2) fails to submit a bill during a five-year period while the firm to which he is "of counsel" carries on litigation, and (3) devotes substantial time to that litigation on behalf of the firm. (JA 13-15, 42, 70)

In *Estep* v. *Johnson,* 383 F.Supp. 1323 (D. Conn. 1974), an attorney was found disqualified to represent a party to a lawsuit because he was a member of the Board of Directors of a legal services organization, and a staff attorney of that organization represented the opposing party in another related case. The Court did not base its decision on whether the attorneys were partners, but on the substance of the relationship and the appearance of the conflict. Here, too, the result is mandated by the reality of the role Feldman has played and will play with Milberg & Weiss in this case. No jury would fail to identify Feldman with Milberg & Weiss merely because Feldman is only "of counsel" to the firm, and their disqualification is required under Canon 5.

D. Milberg & Weiss Have Not Shown that Substantial Hardship Within the Meaning of DR 5-101(B)(4) Would Result from Their Disqualification.

Milberg & Weiss' complaint that counsel for Arthur Young was tardy in moving to disqualify them is misplaced as a matter of fact. (See Arthur Young's principal brief, pp. 17-19.) Even if it were true, it would be "irrelevant," in the words of Judge Weinfeld in *Fabrikant* v. *Seidman*

& Seidman, 72 Civ. 4734 (S.D.N.Y. June 23, 1975), opinion at p. 2.* As this Court has held:

> "Since, as we have noted, disqualification is in the public interest, the court cannot act contrary to that interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility."

Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973) (plaintiff's counsel there was associated with the matter for five years before disqualification).

"Substantial hardship," moreover, cannot be shown by virtue of the length of time counsel is able to maintain its role in a case in which the firm should never have appeared. (See M & W brief at pp. 16-17.) The Code does not intend to reward a law firm for its success in non-compliance with the Code. Similarly, the argument that Milberg & Weiss have intimate familiarity with the facts (*Id.*) may be made by any attorney who represented a party during a transaction and in subsequent litigation. The generalized claim of Milberg & Weiss that they can manage the trial (*Id.*) cannot provide a showing of sufficient hardship. See *Emle Indistries, Inc.* v. *Patentex, Inc.*, *supra*, 478 F.2d at 574-5.

Under the Code, the burden is on the lawyer seeking to continue as counsel to prove "substantial hardship."

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* Judge Weinfeld there stated:

> "The issue involves the integrity of the judicial process and the integrity of the bar. Disqualification of attorneys, where indicated, is in the public interest, which is paramount and overrides the concerns of the parties to the controversy. Thus, whatever a litigant's motive may be, the responsibility rests upon the court to assure not only the maintenance of the highest ethical standards of professional conduct, but also the maintenance in the public mind of a high regard for legal profession." Op. at p. 2 (citations omitted).

Draganescu v. *First National Bank of Hollywood*, 502 F.2d 550, 553 (5th Cir. 1974), *cert. denied*, 95 S. Ct. 1655 (1975). Milberg & Weiss have not met that burden.

Conclusion

In our principal brief, we showed that the principles of *Draganescu* v. *First National Bank of Hollywood, supra*, are controlling here.* The facts of both *Draganescu* and the instant case provide an almost textbook example of a situation where application of the Code's requirements is necessary. Both are cases where the attorney acted as principal negotiator for his clients in the subject transaction, where he ought to and will be among their principal witnesses at trial, and where neither the attorney nor his firm should be trial counsel. The order of the District Court should be reversed and Milberg & Weiss disqualified from further proceedings herein.

Respectfully submitted,

WHITE & CASE
Attorneys for Defendant-Appellant,
Arthur Young & Company

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* Milberg & Weiss attempt to distinguish *Draganescu, inter alia*, because there the attorney seeking to maintain a dual role was the "only person" who acted on behalf of the plaintiff in the subject transaction. (Br. p. 8) But, in fact, the attorney there was not the only representative of plaintiffs who visited the defendant bank; he was merely the "only person who spoke with the bank's lawyer regarding the *exact terms* and time requirements of the proposed will." 502 F.2d at 550. (emphasis supplied) Here, too, after Foley had attended initial meetings with Blair representatives, Feldman negotiated the *exact terms* of the transaction. (JA 22-23, 29, 38-40, 51, 58-59)

Service of 3 copies of the within Brief is hereby admitted this 7th day of July 1975

Signed _____

Attorney for _____

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ATTY. FOR: Plaintiff Appellee
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